

) IN THE ELKHART CIRCUIT COURT
) ss:
) CAUSE NO. 20C01-1109-PL-031

)
)
)

)
)

)
)

)
)

DEPARTMENT OF CORRECTION'S MOTION TO CORRECT ERROR

The Indiana Department of Correction (“DOC”), by counsel, respectfully moves the Court pursuant to Indiana Trial Rule 59 to modify its November 28, 2011, Order removing Petitioner, [REDACTED], from the Indiana Sex and Violent Offender Registry. In support thereof, the DOC asserts:

1. On November 28, 2011, this Court entered an Order removing Petitioner from the Indiana Sex and Violent Offender Registry ("Registry"). (Order, ¶¶ 1-2.).
2. On December 1, 2011, the Court's Order was entered on the chronological case summary. (Docket).
3. Pursuant to Ind. Trial Rule 59(C), any motion to correct error must be filed "not later than thirty (30) days after the entry of a final judgment is noted in the Chronological Case Summary."
4. The Petitioner was convicted, pursuant to a plea of guilty, of Child Molesting as a Class D felony and was sentenced on September 23, 1987, to 2 years, all suspended to probation, under Cause Number 26313 in St. Joseph County.

5. On September 1, 2011, the Petitioner filed his Verified Complaint for Removal From Indiana Sex Offender Registry. (Docket).
6. In *Wallace*, the Indiana Supreme Court reviewed the Indiana Sex Offender Registration Act and whether it violated the Ex Post Facto Clause contained in the Indiana Constitution. See *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), *reh'g denied*. The Court determined that the seven factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-89 (1963), "provide the appropriate analytical framework for analyzing ex post facto claims under the Indiana Constitution." *Id.* at 378-79. The Court held "that as applied to Wallace, the Act violates the prohibition on ex post facto laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed." *Id.* at 384.
7. The DOC, therefore, agrees that Petitioner should be relieved of his affirmative obligation to register as a sex offender on the Indiana Sex and Violent Offender Registry ("Registry") for the offense set forth in Cause Number 26313. Pursuant to the analysis set forth in *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), requiring Petitioner to register as a sex offender would constitute an *ex post facto* punishment in violation of the Indiana Constitution because Petitioner committed his offense under Cause Number 26313 prior to the enactment of the Indiana Sex Offender Registration Act on July 1, 1994.
8. However, the statutes under which Petitioner proceeds do not grant this Court the authority to remove him from the Registry. Ind. Code § 11-8-8-22 details a court's authority to grant relief to sex offenders regarding their duty to register on the Indiana Registry. Section 11-8-8-22(c) only permits a court to "remove the person's designation as an offender" or "require the person to register under less restrictive conditions." I.C. §

11-8-8-22(e). Consequently, if the Court makes a determination pursuant to § 11-8-8-5(a)(8) and § 11-8-8-22(g), the Court may order that Petitioner's designation as a sex or violent offender be removed from the Registry. However, information regarding Petitioner's conviction is a matter of public record, and it should remain on the Registry.

9. Furthermore, Petitioner has not proven that any mechanism exists by which this Court has the authority to order the removal of Petitioner's information from the Registry. Consequently, although it might be technically possible to remove information from the Registry website, this Court is without authority to order the removal of Petitioner's information from the Indiana Sex and Violent Offender Registry. *See State v. Brunner*, 947 N.E.2d 411, 415 (Ind. 2011)(noting that the Legislature has not granted the trial court the authority to modify the conviction at any time other than while delivering the sentence).
10. While the Indiana General Assembly specifically gives the Court the authority, pursuant to Ind. Code § 35-38-5-1, to expunge the arrest record of an individual when no offense was committed, no similar authority exists to expunge an individual's information on the Registry.
11. Additionally, this Court's determination does not affect the ability of the Indiana Parole Board to require Petitioner to register as a condition of any period of parole. *See Weiss v. Indiana Parole Bd.*, 838 N.E.2d 1048, 1051 (Ind. Ct. App. 2005) (holding that the Parole Board has sole discretion to impose conditions on parolees while on parole as long as the conditions are reasonably related to the parolee's successful reintegration into the community and not unduly restrictive of a fundamental right).

12. In addition, Petitioner may have an obligation to register on the Indiana Sex and Violent Offender Registry under the Sex Offender Registration and Notification Act (“SORNA”). *See* 18 U.S.C. § 2250. Any obligation to register under SORNA is independent of, and cannot be overridden by state constitutional provisions. *See* U.S. CONST. art. VI., cl.2; *See also United States v. Leach*, 639 F.3d 769 (7th Cir. 2011). Moreover, under this national system, each jurisdiction must maintain “a jurisdiction-wide sex offender registry” that conforms to the requirements of SORNA. 42 U.C.S. §§ 16911(10), 16912(a). Although Indiana law may not require an individual to register, SORNA may require him to register as a sex offender. *See id.*

13. In a recent opinion discussing SORNA, the Missouri Supreme Court explained the statute as follows:

SORNA provides, *inter alia*, that “[a] sex offender shall register ... in each jurisdiction where the sex offender resides.” 42 U.S.C. section 16913. A “sex offender” is “an individual who was convicted of a sex offense.” 42 U.S.C. section 16911(1). A “sex offense” includes a “criminal offense that has an element involving a sexual act or sexual contact with another.” 42 U.S.C. section 16911(6). SORNA applies to individuals who committed a sex offense prior to July 20, 2006. 42 U.S.C. section 16913(d); 28 C.F.R., section 72.3. Therefore, SORNA imposes an independent obligation requiring respondents to register as sex offenders *in Missouri*.

Doe v. Keathley, 290 S.W.3d 719, 720 (Mo. 2009) (emphasis added), *reh’g denied*. The federal obligation is based upon the category of his crime, and requires that he register in the jurisdiction where he resides, using the registry in place in Indiana.

14. The United States Supreme Court determined in *Carr v. United States*, 130 S.Ct. 2229 (June 1, 2010), that SORNA applies to interstate travel after the enactment of 18 U.S.C. § 2250. 18 U.S.C. § 2250 was enacted in July 2006. *See id.* at 2232; 2234 n. 2.

Therefore, if the Petitioner has traveled within interstate commerce since July 2006, he may be required to register on the Indiana Sex and Violent Offender Registry pursuant to SORNA.

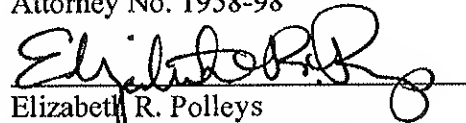
15. The State requests that the Court enter an order limited to Petitioner's affirmative duty to register pursuant to the Indiana Sex Offender Registration Act under Cause Number 26313, while preserving the authority of the Indiana Parole Board and not affecting any federal registration obligation Petitioner may have under SORNA.

WHEREFORE, the Department of Correction, by counsel, respectfully requests that the Court grant its motion to correct error, modify its November 28, 2011, Order and that the Court grant it all other just and proper relief.

Respectfully Submitted,

GREGORY F. ZOELLER
Indiana Attorney General
Attorney No. 1958-98

By:


Elizabeth R. Polleys
Deputy Attorney General
Attorney No. 29048-49

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon the persons listed below, by United States mail, first-class postage prepaid, on December 30th, 2011:

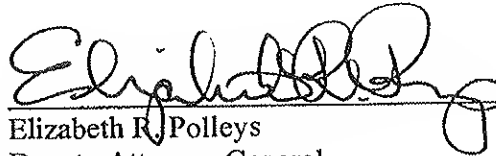
Hon. Terry Shewmaker
Elkhart Circuit Court
101 North Main Street
Goshen, IN 46526

Kathleen M. Sweeney
141 E. Washington Street, Ste. 225
Indianapolis, IN 46204

Nat Henson
Elkhart County Prosecutor's Office
301 S. Main Street
Elkhart, IN 46516

Elkhart County Sheriff's Department
Law Enforcement and Corrections Complex
26861 County Road 26
Elkhart, IN 46517

St. Joseph County Prosecutor's Office
227 West Jefferson Boulevard
South Bend, IN 46601


Elizabeth R. Polleys
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6326
Facsimile: (317) 232-7979
E-mail: Elizabeth.Polleys@atg.in.gov